Malaysian Motor Insurance Pool v Soon Mung Yee (widow) suing on her behalf and on behalf of her children, as dependants of Chew Pow Long deceased & Ors

HIGH COURT (TAIPING) — ORIGINATING SUMMONS NO 24NCVC-338–12 OF 2013
AHMAD NASFY J
18 SEPTEMBER 2014

Insurance — Motor insurance — Construction of policy — Whether application to High Court to determine whether exemption clause in policy absolved insurer of liability premature — Whether fatal accident claim in lower court where causes of accident and death were disputed to be determined first before High Court could be asked to interpret clause(s) in policy

The applicant was the insurer of a lorry which had reversed into a man ('the deceased') causing him fatal injuries. The accident occurred within the premises of a factory where the lorry had come to unload wooden planks. The deceased's widow (the first respondent) and her children brought an action for damages against the owner and driver of the lorry (the second and third respondents respectively) in the sessions court. On receiving notice of the claim, the applicant filed the instant application for a declaration that it was not liable to satisfy any judgment that might be awarded against their insured by the sessions court on the ground an exception clause in the insurance policy exempted the applicant from liability if the death, bodily injury or damage was 'caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the motor vehicle for loading thereon or the taking away of the load from the motor vehicle after unloading therefrom'.

Held, dismissing the application:

(1) The instant application was clearly premature as the issue of where and how the accident occurred and the cause of the deceased's death was the subject of a dispute which had yet to be decided in the sessions court. It was still a living issue. It was therefore inappropriate for this court without the benefit of viva-voce evidence to rule, based on affidavit evidence, as to how the accident actually occurred. There was nothing in the affidavits to suggest the parties had agreed in writing that the accident occurred through the negligence of the lorry driver. Thus, to allow this application to co-exist with the personal injury action was to allow a multiplicity of proceedings which would tantamount to an abuse of process (see para 13).

(2) The determination as to whether liability of insurers should be excluded, in cases of this nature where the facts relating to how the accident occurred was still in dispute, should be determined after the conclusion of the personal injury action where viva-voce evidence had been led, tested and verified and not by way of the present procedure which might only be utilised effectively in a very clear case involving pure construction of the clause(s) in the policy (see para 13).

[Bahasa Malaysia summary

Pemohon adalah syarikat insurans lori yang mana telah mengundur dan melanggar lelaki ('si mati') yang menyebabkannya kecederaan maut. Kemalangan berlaku dalam premis kilang di mana lori ke sana untuk memunggah papan kayu. Balu si mati (responden pertama) dan anak-anaknya membangkitkan tindakan untuk ganti rugi terhadap pemilik dan pemandu lori (masing-masing responden kedua dan ketiga) di mahkamah sesyen. Selepas menerima notis tuntutan, pemohon memfailkan permohonan ini untuk perisytiharan bahawa ia tidak bertanggungjawab untuk memenuhi apa-apa penghakiman yang mungkin diawardkan terhadap yang diinsuranskan oleh mahkamah sesyen atas alasan klausa pengecualian dalam polisi insurans mengecualikan pemohon daripada liabiliti jika kematian, kecederaan badan atau kerosakan 'caused or arising beyond the limits of any carriageway or thoroughfare in connection with the bringing of the load to the motor vehicle for loading thereon or the taking away of the load from the motor vehicle after unloading therefrom'.

Diputuskan, menolak permohonan:

(1) Permohonan ini adalah jelas pramatang memandangkan isu di mana dan bagaimana kemalangan berlaku dan sebab kematian si mati adalah subjek pertikaian yang boleh lagi diputuskan di mahkamah sesyen. Ia masih menjadi isu hidup. Oleh itu adalah tidak wajar untuk mahkamah ini tanpa faedah keterangan *viva-voce* untuk memutuskan, berdasarkan atas keterangan afidavit, bagaimana kemalangan tersebut sebenarnya berlaku. Tidak terdapat apa-apa dalam afidavit untuk mencadangkan pihak-pihak telah bersetuju secara bertulis bahawa kemalangan akibat kecuaian pemandu lori. Oleh itu, untuk membenarkan permohonan ini untuk wujud bersama tindakan kecederaan diri adalah untuk membenarkan kepelbagaian prosiding yang akan terjumlah kepada penyalahgunaan proses (lihat perenggan 13).

(2) Penentuan terhadap sama ada liabiliti syarikat insurans patut dikecualikan, dalam kes-kes bersifat begini di mana fakta berkaitan bagaimana kemalangan berlaku masih dalam pertikaian, patut ditentukan selepas tamatnya tindakan kecederaan diri di mana keterangan *viva-voce* telah dibangkitkan, diuji dan disahkan dan bukan melalui prosedur ini yang mungkin digunakan secara efektif dalam kes

yang amat nyata melibatkan pembentukan tulen klausa-klausa dalam polisi tersebut (lihat perenggan 13).]

Notes

For cases on construction of policy, see 8 *Mallal's Digest* (5th Ed, 2015) paras 412–416.

Cases referred to

Central Lorry Service Sdn Bhd v The American Insurance Co [1981] 2 MLJ 40 (refd)

Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, FC (refd)

Ramamoorthy (Ng Chee Kong & Co) for the applicant.
Amar Singh (Gurdev Dalgit Su & Co) for the first respondent.

Ahmad Nasfy J:

INTRODUCTION

[1] This is yet another case that brings about a dispute on the scope and extent of insurance companies' liability arising from an accident. The application herein by the insurer (encl No 1) the motorlorry CG 6800 is for a declaration that the insurer is not liable to satisfy any judgment that might be awarded against their insured by the session court in Kuala Kangsar.

FACTUAL BACKGROUND

[2] The applicant in supporting the application states that on 5 July 2010 the motorlorry No CG 6800 which was insured by the applicant/insurance company reversed into Chew Pow Loong who died from the injuries he sustained. This is also stated by the insurer in the affidavit of T Rajasingam (encl 2) para 12(b) and in the police report of the lorry driver marked as HS2 in the affidavit of Harban Singh (encl 7). It is to be noted that the accident occurred within a factory premises when the motorlorry had come into the factory with a view to unload some wooden planks.

[3] The widow of the deceased (first respondent) and her children have now brought an action against the owner and lorry driver in Kuala Kangsar Session Court for damages.

[4] Due notice of this claim has been given to the insurance company. The second respondent herein is the owner of the said motorlorry and the third respondent is the driver of the motorlorry.

[5] The insurance company now seeks to avoid liability under the policy it issued in respect of motorlorry No CG 6800. The clause relied on by the insurer to avoid liability appears on p 3 of the policy as in exh TRCT2 in affidavit of T Rajasingam (encl 2) (the insurance claims executive of the applicant) and reads as follows:

> Exception to section 11
>
> The pool shall not be liable in respect of (i) death, bodily injury or damage caused or arising beyond the limits of any carriageway or thoroughfare *in connection with the bringing of the load to the motor vehicle for loading thereon or the taking away of the load from the motor vehicle after unloading there from.*

[6] Having called for and read the respective submissions, I have dismissed the applicant's application vide encl 1 with costs. I shall now state my grounds.

ISSUES

[7] Essentially this application only centers on one (1) issue: whether the originating summons filed by the insurers to seek a declaration that the insurers are not liable to pay the plaintiff any damages which might be awarded in Kuala Kangsar Sessions Court Summons No 53–217–2010 comes within the exception to section 11 of the policy.

FINDINGS OF THE COURT

[8] It is pertinent to note that the insurance company must satisfy this court or prove that the death of the deceased comes within the terms of the above clause to avoid liability. In my judgment, a proper interpretation of the above clause, the insurance company must show two things to escape liability, namely:

(a) the death occurred beyond the limits of any carriageway; and

(b) the death was caused in connection with the taking away of the load after unloading from the said motorlorry.

[9] It is my considered view that in this case the fact that the accident occurred beyond the limits of a carriageway is not disputed. Nowhere has the insurer stated in its policy it would not be liable for any accidents occurring beyond a carriageway perse. It is only accidents occurring beyond a carriageway in connection with the taking away of the load after unloading that are excluded from liability.

[10] As a matter of fact I find that the authorities cited by learned counsel for insurer on definition of road are not relevant to the issue at hand. Having stated above I am of the view that the insurer is liable to a third party if an accident is

caused by the motorlorry while it is in the process of loading or unloading. This is so provided on p 2 of the policy under 's 11–Liability to Third parties' wherein cl I reads as follows:

> The pool will subject to the limits of liability indemnity the insured in the event of accident caused by or arising out of the use of the motor vehicle or in connection with the loading or unloading of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of (b) death of or bodily injury to any person

Thus from the above clause, the insurer would be liable where their insured lorry causes an accident whilst being used in the process of loading or unloading. In other words, the insurance company should only be held liable for the negligent driving of its insured vehicle and not where the deceased is killed when the load from the lorry is being taken away by some other vehicle such as a forklift after unloading from the motorlorry.

[11] In this respect we need to ask the question–what caused the death of the deceased? From the evidence presented through affidavits it is very clear that the deceased was killed due to the negligent reversing of the insured motorlorry itself into the deceased. It was not some act or some other vehicle involved in the taking away of the load from the said motorlorry that killed the deceased but, to reiterate, the reversing of the said insured motorlorry itself that killed the deceased.

[12] It is my considered view that should these be any doubt or ambiguity in construing the above exclusion clause such ambiguity should be construed against the insurance company under the contra proferentum rule (see *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 (FC), *Central Lorry Service Sdn Bhd v The American Insurance Co* [1981] 2 MLJ 40).

[13] Having stated the above, I must hasten to add that this application was clearly premature as the issue where and how the accident occurred and the cause of death of the deceased is a subject of a dispute and had yet to be decided in the session court. In other words it is still a living issue. I do not think it is appropriate for me without the benefit is viva voce evidence to simply rule, based on affidavit evidence as to how the accident actually occurred. There is nothing in the affidavit to suggest that the parties had agreed in writing that the accident though the negligence of the lorry driver. Thus to allow this application to co-exist with the personal injury action would be to allow a multiplicity of proceeding which would also tantamount to an abuse of process. I should like to also observe in passing that the practice of insurance company having second thought about representation midway through the trial of personal injury claim is undesirable as it cannot be fathomed that the insurance company is unaware that an accident might have occurred within the

ambit of exception to section 11 of the policy. It is unimaginable that the lawyers appointed by the insurance company all of the sudden 'obtained revelation at the middle of the trial' that there could be exception to the liability. In any event I am of the view that the determination as to whether liability of the insurers should be excluded, in cases of this nature, where the issue of the circumstances of the accident is still in dispute, should be determined after a personal injury action where viva voce evidence ought to be led, tested and verified and not by way of the present procedure. Lest I be accused of making a sweeping ruling, I must add that in a very clear case the present procedure may be employed to determine the liability of the insurance company even before a personal injury action is concluded so as to save cost and time. As to what circumstances that the present procedure may be utilised or the category of cases falling within the scope thereof, that has to be decided on case to case basis. I would venture to suggest that cases that involved dispute of facts relating to how the accident occurred would not fall within the category and conversely cases involving pure construction of the clause(s) in the insurance policy would fall within the scope of category of cases where the present procedure may be utilised effectively.

CONCLUSION

[14] Based on the reasons adumbrated above, I hereby dismissed encl 1 with costs.

Application dismissed.

Reported by Ashok Kumar